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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 65.

UNITED STATES,
Appellant,

vs.

HERBERT GUEST, et al.,
Appellees.

BRIEF

Of Counsel for Appellee, James Spergeon Lackey.

INTRODUCTORY STATEMENT.

In the Transcript of Record filed March 29, 1965, jurisdiction postponed June 1, 1965, the following does not appear:

"United States, Appellant v. Herbert Guest et al., No. 1023.

"April 26, 1965. The motion of appellee, Lackey, for the appointment of counsel is granted and Charles J. Bloch, Esquire, of Macon, Georgia, a member of the Bar of this

Court, is appointed to serve as counsel for the appellee Lackey in this case."

85 S. Ct. 1343 ... U. S. ....

Counsel so appointed and now acting and who submits this brief on behalf of Lackey was not of counsel for Lackey or any other appellee in the court below.

There, the District Court dismissed the indictment against appellees. The United States of America appealed under Title 18 U. S. C. 3731.

In the course of the opinion the court said:

> "The statute upon which the government relies originated as Section 6 of the act of May 31, 1870, 16 Stat. 140. It subsequently and successively became known as Section 5508 of the Revised Statutes of 1874-1878, Section 19 of the Criminal Code of 1909, and 18 U. S. C. A. § 51, 1926 Edition, and is presently 18 U. S. C. A. § 241, 1948 edition, which reads as follows:
>
> 'Conspiracy against rights of citizens.
>
> 'If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> 'If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured——
>
> 'They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.' "
>
> (Tr. 21-22.)

It seems to me that the very first question for decision by this court is whether by reason of vagueness and uncertainty the statute is repugnant to the due process clause of the Fifth Amendment: "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

The decision of the District Judge did not rest upon this ground.

In footnote 5 of his opinion, the District Judge said:

> "The Supreme Court did not reach the question of vagueness in the Williams case" (**United States v. Williams**, 341 U. S. 70, 95 L. Ed. 758 (1951)).

(Apparently neither did he in this case.)

However, in the dissenting opinion in the **Williams** case written by Mr. Justice Douglas, with whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Clark concurred, we find (pages 94-95) a discussion of vagueness concluding with this paragraph:

> "In view of the nature of the conspiracy and charge to the jury in the instant case, it would be incongruous to strike § 19 down on the grounds of vagueness and yet sustain § 20 as we did in the Screws case."

What I am suggesting here cannot be cured by what may be alleged in the indictment, nor what may at some time be given in charge by a court to a jury. It dispenses with any argument with reference to the **Screws** case (325 U. S. 91). For in that case it was solely because of the word "wilfully" appearing in Title 18 § 242, that the Supreme Court held that section valid.

In 1939, immediately preceding the appointment to the court of Mr. Justice Douglas, the court decided **Lanzetta, et al. v. State of New Jersey**, 306 U. S. 451, and held:

"If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 94 U. S. 214, 221 . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct, and warns against transgression. See **Stromberg v. California,** 283 U. S. 359, 368, . . . **Lovell v. Griffin,** 303 U. S. 444, . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U. S. 385, 391 . . . 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'"

Recently (1964), this court has decided the cases of:

Griffin, et al. v. State of Maryland, 378 U. S. 130;
Barr, et al. v. City of Columbia, 378 U. S. 146;
Bouie, et al. v. City of Columbia, 378 U. S. 347;
Bell, et al. v. State of Maryland, 378 U. S. 226;
Robinson, et al. v. State of Florida, 378 U. S. 153.

The United States as Amicus Curiae filed a brief entitled in all of these cases (September, 1963). It was submitted by Archibald Cox, Solicitor General; Burke Marshall, As-

sistant Attorney General; Ralph S. Spritzer and Louis F. Claiborne, Assistants to the Attorney General, and Harold H. Greene and Howard A. Glickstein, Attorneys.

At pages 26-27 of that brief they wrote:

> "The general rule is plain: 'Before a man can be punished, his case must be plainly and unmistakably within the statute.' United States v. Brewer, 139 U. S. 278, 288. A vague criminal statute 'violates the first essential of due process.' Connally v. General Construction Co., 269 U. S. 385, 391. It is, like 'the ancient laws of Caligula,' a trap for the innocent. United States v. Cardiff, 344 U. S. 174, 176. The duty of warning before punishing applies equally to the States. The Fourteenth Amendment 'imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required.' Cline v. Frink Dairy Co., 274 U. S. 445, 458. See also, Wright v. Georgia, 373 U. S. 284; Cramp v. Board of Public Instruction, 368 U. S. 278; Winters v. New York, 333 U. S. 507, 519; Musser v. Utah, 333 U. S. 95, 97; Lanzetta v. New Jersey, 306 U. S. 451, 453."

Mr. Justice Douglas delivered his dissent in **United States v. Williams, et al.**, 341 U. S. 70, supra, April 23, 1951. The next year (December 8, 1952) he wrote for the majority in **United States v. Cardiff**, 344 U. S. 174, using the oft-quoted language:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited.. Words which are vague and fluid, cf. United States v. L. Cohen Grocery Co., 255 U. S. 81, . . . may be as much of a trap for the innocent as the ancient laws of Caligula" (page 176).

In that same brief, at page 34, appears this language:

> "To be sure, the South Carolina Supreme Court decided in the instant cases that the statute applies to petitioners' conduct. But it is well settled that the requirement of adequate forewarning is not satisfied by judicial construction of the statute in the very case in which it is challenged as too broad and indefinite. Such a retrospective interpretation 'is at war with a fundamental concept of the common law.' Pierce v. United States, 314 U. S. 306." Then followed footnote 23:
>
> "**Pierce** involved a statute making it criminal to pretend to be an 'officer' . . . 'acting under the authority of the United States, or any Department, or any officer of the government thereof.' It was held material error to refuse to instruct that pretending to be an officer of the TVA, a government corporation, would not be within the statutory prohibition. This Court declared (314 U. S. at 311): '. . . (J)udicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' "

And at page 35 is a quotation from Professor Freund:

> "The objection to vagueness is two fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss."

Mr. Justice Brennan wrote for the majority of the court in the Bouie case, supra.

At page 350, he commenced:

> "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this court. As was said in United States v. Harriss, 347 U. S. 612, 617,
>
> " 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' "

In that **Harriss** case, Chief Justice Warren and four Associate Justices held that the statute met the constitutional requirement of definiteness.

Toward the beginning of his opinion (p. 617) the Chief Justice wrote words which are most apt here:

> "We are not concerned here with the sufficiency of the information as a criminal pleading. Our review under the Criminal Appeals Act is limited to a decision on the alleged 'invalidity' of the statute on which the information is based. **In making this decision, we judge the statute on its face**" (Emphasis added).

Justices Douglas, Black and Jackson dissented. Justice Clark did not participate. Justice Douglas, in writing for himself and Justice Black, used "the test of Connolly v. General Construction Co., 269 U. S. 385, 391 . . ." and stated the question to be "whether **this statute** 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess

at its meaning and differ as to its application'" (Emphasis added).

In the **Bouie** case, too, Justice Brennan recognized the rule of the Connolly and Lanzetta cases, supra (p. 351). He quoted the words above quoted from the Pierce case and from Professor Freund (pp. 352-3) in support of the proposition:

> "There can be no doubt that a deprivation of the right of fair warning can result **not only** from vague statutory language **but also** from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language" (p. 352—emphasis added).

In footnote 5 at page 355, he used this cogent language: "We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibitions **must be made on the basis of the statute itself and the other pertinent law,** rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants . . ." (Emphasis added).

Since the decision in **United States v. Williams,** supra (241 U. S. 70 (1951)), the court has also decided **Cramp v. Board of Public Instruction of Orange County, Florida** (1961), 368 U. S. 278. Justice Stewart wrote for the court. In part he wrote:

> "We think this case demonstrably falls within the compass of those decisions of the court which hold that '. . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its

meaning and differ as to its application, violates the first essential of due process of law' " (p. 287).

Three years later, the Cramp case was followed and applied by the court in **Baggett et al. v. Bullit et al.**, 377 U. S. 360. There, Justice White wrote for the court. Two statutes of the State of Washington were there involved, one of 1955, one of 1931. The discussion of both is apt. The discussion of that of 1931 held to offend due process is particularly apt (p. 371).

The 1931 legislation applied to teachers, who, upon applying for a license to teach or renewing an existing contract, were required to subscribe to the following: "I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

At pages 371-2, Justice White depicts just how difficult it would be for an affiant to determine what range of activities might be deemed inconsistent with the promise, or what might be done without transgressing the promise to promote undivided allegiance to the government of the United States. The court concluded that the oath provides no "ascertainable standard of conduct."

One of the most recent of the "void for vagueness" cases **Dombrowski et al. v. Pfister, etc., et al.**, 380 U. S. 479, 85 S. Ct. 1116 (April 26, 1965), in which the court held that that provision of the Louisiana Subversive Activities and Communist Control Law defining subversive organizations violates due process in that its language is unduly vague and uncertain and broad.

When we apply the teachings of those cases (and other similar ones* which could be discussed) to § 18-241, it is readily apparent that it, too, as written is void for vagueness.

A fortiori, when it is sought to be applied so as to embrace Fourteenth Amendment rights it is void.

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ."

If one unlearned in the law may be presumed to know that "citizen" is not synonymous with "resident or inhabitant," he must further know what rights or privileges are secured to a citizen by the Constitution or laws of the United States.

The utter vagueness of the phrase, "any right or privilege secured to him by the Constitution or laws of the United States" is demonstrated not only by the phrase standing alone but by the hundreds of thousands of words which Justices and Judges have written since 1870 seeking to explain what the phrase did or did not embrace.

The vagueness is magnified and intensified when it is asserted that the Fourteenth Amendment confers rights or privileges upon the citizen which are covered by the statute.

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* Wright v. Georgia, 373 U. S. 284;
Herndon v. Lowry, 337 U. S. 1;
Edwards v. South Carolina, 372 U. S. 229;
International Harvester Co. v. Kentucky, 234 U. S. 216;
Stromberg v. California, 283 U. S. 359;
Winters v. New York, 333 U. S. 507;
Smith v. California, 361 U. S. 147;
Cole v. Arkansas, 333 U. S. 196;
U. S. v. Cohen Grocery Co., 255 U. S. 81;
Jordan v. deGeorge, 341 U. S. 223.

That is demonstrated by part of the opinion of the majority of the Court of Appeals of the Fifth Circuit in the **Williams** case (179 F. 2d 644, 647), especially when it is considered in connection with one of the holdings in the **Bouie** case, supra.

Judge Sibley wrote there:

"The indictment (under what is now Title 18, § 2417) follows the statute in its generalities, and is sufficient in its specifics to be a good criminal pleading, and if it fails to allege a crime it is because the statute fails validly to create such a one. The failure lies in the application of the statute to the provisions of the Fourteenth Amendment, 'Nor shall any State deprive any person of life, liberty, or property, without due process of law,' because of the extreme vagueness of the quoted clause. Reference is made to the discussions of a similar question touching Sec. 20 in Screws v. United States, 325 U. S. 91 . . . wherein by a closely divided court that statute was upheld because it provided that 'wilful' violations only were to be crimes, and that meant that the accused, exercising the power of the State, not only deprived another of a federally secured right, but knew it was such, and wilfully flouted the Constitution and laws of the United States. The indictment does not charge these defendants with 'wilfulness,' nor does the statute mention it, and the judge refused to give the jury on request charges that 'wilfulness' was a necessary element of the case. 2. The Congress and the federal court are themselves faced here with the provision of the Fifth Amendment that 'No person shall . . . be deprived of life, liberty or property, without due process of law,' and it is found right in the midst of provisions in the Fifth and Sixth Amendments about federal prosecutions for crime. It is well

understood that 'due process' applies not only to court procedure, but also to legislation, especially in criminal matters. There are no common law federal crimes, but all are created by statute, though common law words in the statute may take their intended meaning from the common law. Not only must the accusation inform the accused for what he is to be tried, but due process requires that the statute must inform the citizen in advance by a reasonably ascertainable standard what the crime shall be. A judge may not establish the standard, save by reasonable interpretation, after the deed is done, for that is in substance to give the statute life *ex post facto*, which the Constitution forbids also. All this we understood to be admitted by all the justices in the opinions in the Screws case. The word 'wilful' in Sec. 20 was held by the majority to mean that the accused knew the federal right existed and intentionally and purposely violated it, and his knowledge and wilfulness made him a criminal. . . ."

Consider what is said there as to "ex post facto" in connection with one of the holdings of the court in the Bouie case, supra, and the unconstitutional vagueness of § 18-241 (which was § 19 at the time of the decision in the Williams case in the Fifth Circuit) is convincingly demonstrated.

There, following the Pierce case, the court on June 22, 1964, said:

> "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids."

Had the appellee, Lackey, been learned in the law and seeking to determine whether Fourteenth Amendment

rights were embraced in § 241, he would have found that four Justices of the Supreme Court had as late as 1951 concurred in an opinion which concluded:

> "We therefore hold that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgement by the States."

He would have found that the Supreme Court of the United States had in **United States v. Powell**, 212 U. S. 564, affirmed a lower Federal Court holding that participants in a mob which seized a Negro from the custody of a local sheriff and lynched him were not indictable under § 241.

He would have found that a former Chief Justice of the United States (Mr. Charles E. Hughes) had said in argument to the Court:

> "The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State."
>
> **United States v. Wheeler**, 254 U. S. at page 291.

He would have found that argument impliedly accepted by the Supreme Court in that case, and that the Court then included Justices Holmes and Brandeis.

He would have been entitled to the protection of that rule of law reiterated by the Court in the Bouie case, supra:

A court, in giving retroactive application to its new construction of a statute, deprives persons of their right

to fair warning of a criminal prohibition and thus violates the Due Process clauses of the Amendments to the Constitution.

I respectfully suggest that the Court need proceed no further in its consideration of this appeal. A judgment of affirmance is, under applicable decisions, demanded.

> ". . . it is well established that an appellee in whose favor a judgment has been rendered is entitled to an affirmance on any proper ground."

Mr. Justice Black, in **Cameron v. Johnson**, 85 S. Ct. at page 1754, footnote 6.

If the Court should not consider the vagueness of § 18-241 a "proper ground" for affirmance of the judgment below, we would pass to a discussion of the question as posed by Appellants:

I.

> "Whether Section 241 of the Criminal Code reaches unofficial conspiracies against the exercise of rights secured by the Fourteenth Amendment."
>
> (Jurisdictional Statement, page 2.)

In **United States v. Williams et al.**, 341 U. S. 70, 82, affirming 179 F. 2d 644, Justices Frankfurter, Chief Justice Vinson, Justices Jackson and Minton, held:

> ". . . that including an allegation that the defendants acted under color of State law in an indictment under § 241 does not extend the protection of the section to rights which the Federal Constitution merely guarantees against abridgement by the States. Since under this interpretation of the statute the indictment must fall, the judgment of the court below is affirmed."

On the preceding page of the opinion, they had written:

> "But the validity of a conviction under § 241 depends on the scope of that section which cannot be expanded by the draftsman of an indictment."

The decision of the court below was affirmed, though Justice Black for reasons other than those expressed by the Justices named, thought the convictions "must fail" (op. cit. p. 86).

Justice Douglas, with whom Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Clark concurred, dissented.

As I read the dissenting opinions, the dissenting Justices there would not have held that § 241 applied to "unofficial" conspiracies. I think this conclusion is justified by what was written by Justice Douglas at pages 91-2 (341 U. S.). It is also justified by the opinion of Justice Douglas in the companion case of **Williams v. United States**, 341 U. S. 97, wherein the Justice described Williams as a "special police officer who in his official capacity subjects a person . . . to force and violence . . ." See also the Chief Justice's recognition of Williams' status in **Griffin v. State of Maryland**, 378 U. S. 133, 135. The excerpt I have in mind commences: "Thus in United States v. Mosley, 238 U. S. 383, 387, Mr. Justice Holmes observed that § 19 'dealt with federal rights, and with all federal rights.'" Regardless of what else might be said to this clause and its context, it appears that immediately after using it Justice Holmes recognized the validity of **United States v. Reese**, 92 U. S. 214, and it appears also that the conspirators were **election officers** who conspired to "injure and oppress qualified voters . . . in the exercise of their right to vote for members of Congress . . ." (p. 383). They were not ordinary individuals. As was said by the

Court later in **United States v. Raines** (1960), 362 U. S. 17, 25, ". . . it is enough to say that the conduct charged —discrimination by state officials, within the course of their official duties, against the rights of United States citizens, on grounds of race or color—is certainly, as 'state action' and the clearest form of it, subject to the ban of that amendment, . . . It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth amendments."

Next in the excerpt is: ". . . Fourteenth Amendment rights have sometimes been asserted under § 19 and denied by the Court. That was true in United States v. Cruikshank, 92 U. S. 542, . . . But the denial had nothing to do with the issues in the present case. The Fourteenth Amendment protects the individual against **state action**, not against wrongs done by **individuals** (The emphasis is his). See Civil Rights Cases 109 U. S. 3, . . . Shelley v. Kraemer, 334 U. S. 1, . . . The Cruikshank case, like others, involved wrongful action by **individuals** who did not act for a state nor under color of state authority."

The other cases, listed in footnote 4 (p. 92), to which reference was made were **Hodges v. United States**, 203 U. S. 1, . . . **United States v. Powell**, 151 Fed. 648, affirmed 212 U. S. 504 . . .; **United States v. Wheeler**, 254 U. S. 281, 298.*

So I submit that I am justified in my conclusion that there would have been no such dissent in the Williams case had the conspiracy been an "unofficial" one; had the dissenting Justices not deemed Williams, et al. to be acting under color of State law. Indeed, the main opinion

* At page 93, Justice Douglas calls attention to the fact that the failure to apply § 19 to protection of Fourteenth Amendment rights arose because the action complained of was *individual* action, not *state* action.

(at pages 80, 81) alludes to the Hodges, Wheeler, and Powell cases, and states that in none of them "was it alleged that the defendants acted under color of State law" (p. 81).

So, as I read the Williams case, Justice Frankfurter, Chief Justice Vinson, Justice Jackson, and Justice Minton were of the view that § 241 **did not** apply even to interferences by state officers with rights which the federal government merely guarantees from abridgement by the State; Justices Douglas, Reed, Burton and Clark were of the view that § 241 **did** apply to interferences by **state officers** with rights which the federal government merely guarantees from abridgement by the State; no one of the Justices was of the view that § 241 applied to actions of private individuals against private individuals with respect to rights which the Constitution merely guarantees from interference by a State.

That this conclusion is justified is demonstrated by a review of the cases construing and applying § 241 (as numbered variously from time to time).

It may be well to commence this review with another quotation from the dissent written by Justice Douglas in the **Williams** case, supra:

> "Section 19 has in fact been applied to the protection of rights under the Fourteenth Amendment. See United States v. Hall, 26 Fed. Cas. page 79, No. 15,282; United States v. Mall, 26 Fed. Cas. page 1147, No. 15,712; Ex parte Riggins, 134 Fed. 404, writ dismissed, 199 U. S. 547, 26 S. Ct. 147, 50 L. Ed. 303."
>
> 341 U. S. at 92-93;
> 71 S. Ct. at 593.

The Hall case cited was decided by Circuit Judge Woods sitting in the Circuit Court Southern District of Alabama

in May of 1871. It involved an indictment for a violation by individuals of the 6th section of the act of Congress of May 31, 1870 (16 Stat. 140) known as the "Enforcement Act." The indictment was held valid.

The same court in 1871 decided the Mall case similarly.

Judge Woods was a native of Ohio, a general in the Union Army during the War between the States. After the war, he settled in Alabama, of which state he was appointed Chancellor. Later, President Grant appointed him United States Circuit Judge for the Fifth Circuit. In 1881, Judge Woods became Justice Woods by his appointment to the Supreme Court by President Hayes.

As Circuit Justice, on July 6, 1882, in **LeGrand v. United States**, 12 Fed. 577, he declared § 5519 of the Revised Statutes (Part of § 2 of the Act of April 20, 1871), unconstitutional because "decisions of the Supreme Court" which he cited "leave no constitutional ground for the act to stand on."

The decisions he cited were **United States v. Reese**, 92 U. S. 214; **United States v. Cruikshank**, 92 U. S. 542; **Virginia v. Rives**, 100 U. S. 313.

It is noteworthy that forty years later (1920) between the time Justice Hughes was a Justice of this court (1910-1916), and the time he became Chief Justice (1930), he as counsel, argued before the court **United States v. Wheeler, et al.**, 254 U. S. 281. Therein (p. 291) he argued "The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State." For that proposition he cited, *inter alia*, **Cruikshank** and **Rives.**

So in 1882, Justice Woods had cited Cruikshank and Reese in holding: "Where a state has been guilty of no

violation of the provisions of the thirteenth, fourteenth and fifteenth amendments to the constitution of the United States, no power is conferred upon Congress to punish private individuals who, acting without any authority from the State, and it may be in defiance of law, invade the rights of the citizen which are protected by such amendments."

LeGrand v. United States, 12 Fed. 577 (July 6, 1882).

At the following October Term of the Supreme Court, Justice Woods wrote for the court in holding § 5519 (originally a part of Section 2 of the act of April 20, 1871) unconstitutional.

United States v. Harris, 106 U. S. 629.

So disappeared any impact which the Hall and Mall cases may have had on the case at bar. Justice Woods, who, as Judge Woods, had decided them, realized and held in **LeGrand** that **Cruikshank** and **Reese** and **Rives** were then controlling. And a few months later writing for the Supreme Court, he again so held as to § 5519.

Ex parte **Riggins**, 134 Fed. 404 ("writ dismissed, 199 U. S. 547"), is also cited in this connection in the dissenting opinion in **Williams**.

Riggins is intertwined with **United States v. Powell**, 151 Fed. 648, affirmed, 212 U. S. 564, cited by Justice Douglas at page 93 of 241 U. S.

The report of **Riggins** (199 U. S. 547), shows that Riggins and Powell were indicted under §§ 5508, 5509 in the District Court for the Northern Division of the Northern District of Alabama in 1904. A severance was ordered as between Powell and Riggins. Riggins filed his petition for *habeas corpus*. The District Judge discharged the writ and remanded Riggins to custody. The opinion of

the District Judge is reported 134 Fed. 404. The Supreme Court quashed the writ and dismissed the petition for habeas corpus.

The author of a note in American Law Reports Annotated (162 A. L. R. at page 1386 (e)), says:

> "In United States v. Powell (1909), 212 U. S. 564 . . . (affirming 1907 . . . 151 Fed. 648, and adopting the opinion therein), the statute was held to afford no protection against the act of private individuals in taking a prisoner from the state officers and murdering him to prevent his trial. But in ex parte Riggins (1904: C. C.), 134 Fed. 404, involving the sufficiency of an indictment based upon the same facts the court held that the statute did give such protection provided there was no attempt to alter or interfere with the state laws or the authority of its officers in executing them. The case was reversed (sic) in (1905) 199 U. S. 547 . . . on other grounds.* In United States v. Powell (U. S.) supra, the government urged the court to adopt the position taken by the Circuit Court in ex parte Riggins, but since the Supreme Court did not go into the question on appeal, the court held that taking a prisoner from state officers and murdering him did not constitute an impairment of the right of trial by jury, the court citing Hodges v. United States (1906), 203 U. S. 1 . . . where it was held that the Thirteenth Amendment did not empower Congress to make it an offense for private individuals to impair employment and contract rights of negroes because of race, color, or previous condition of servitude."

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* As a matter of fact, it was not "reversed." The writ of error was quashed, and the petition dismissed because it had been sought to substitute it for a writ of error.

The same Judge, Judge Thomas Goode Jones,** wrote the opinions in **Riggins** and **Powell.** The difference in his holdings is explained at the beginning of his opinion in **United States v. Powell,** 151 Fed. at p. 650, as follows:

> "When the court discharged the writ of habeas corpus sued out by Riggins, it decided the questions raised by the demurrer adversely to the contention now made by this defendant. Ex parte Riggins (C. C.), 134 Fed. 404. Since that decision, the Supreme Court has decided the Hodges case, 27 S. Ct. 6, 51 L. Ed. ...,*** which held, in effect, contrary to the decision of Justice Bradley in United States v. Cruikshank, 1 Woods 308, Fed. Cas. No. 14,897, that the rights and immunities claimed here under the thirteenth amendment were not secured under the Constitution or laws."

He proceeded to sustain the demurrer to the indictment and the Supreme Court affirmed him (212 U. S. 564) on the authority of the Hodges case.

Variously labeled but with its contents the same, what is now § 241 has been many times, since **Cruikshank,** considered by the Court over the years.

1884—*ex parte* **Yarbrough,** 110 U. S. 651.

> "Stripped of its technical verbiage, the offense charged in this indictment* is that the defendants conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and in the execution of that conspiracy they beat,

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** Judge Jones was the aide of General John B. Gordon at the surrender at Appomattox. He was appointed to the Federal bench by President Theodore Roosevelt. He was the father of the late Judge Walter B. Jones (See 357 U. S. 449).

*** 203 U. S. 1.

* Presented by Emory Speer, U. S. Attorney, who afterwards as United States Judge presided in U. S. v .Lancaster, 44 Fed. 885.

bruised, wounded and otherwise maltreated him; and in the second count that they did this on account of his race, color and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises."

(op. cit. 657.)

The Court held that the indictment stated an offense under §§ 5508, 5520 of the Revised Statutes. The reason for the holding was that Saunders' right to vote in an election for Representatives in Congress was a right based upon the Constitution "and Congress has the constitutional power to pass laws for the free, pure and safe exercise of this right" (p. 652).

While Cruikshank is not cited by name, at pages 665-6 the Court said:

> "The reference to cases in this court in which the power of Congress under the first section of the Fourteenth Amendment has been held to relate alone to acts done under State authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."

The Court therein also said: "The power arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is de-

pendent on the laws of the United States." (Emphasis added.)

1884—United States v. Waddell et al., 112 U. S. 76.

The Court at page 80 quoted the language from the Yarbrough case just above quoted. It held that the exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands conferred by Revised Statutes § 2289 was the exercise of a right secured by the Constitution and laws of the United States within the meaning of § 5508. The Court specifically stated: "The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guarantee safety and protection to persons in the exercise of rights dependent upon the laws of the United States, including of course, the Constitution and treaties as well as statutes, and it does not, in this section at least, design to protect any other rights" (p. 79). Also, "The right here guaranteed is not the mere right of protection against personal violence."

1887—Baldwin v. Franks, 120 U. S. 678.

As to § 5508, the question was whether what Baldwin was charged with constituted an offense within the meaning of its provisions, i. e. was he charged with conspiring with respect to a right or privilege secured to a citizen by the Constitution or laws of the United States? He was charged with "conspiring . . . to deprive certain subjects of the Emperor of China 'of the equal protection of the laws and of equal privileges and immunities under the laws'" as guaranteed to them by treaties between the United States and the Emperor of China.

The court held the word "citizen" in R. S. 5508 is used in the political sense as in the Fourteenth Amendment and not as being synonymous with "resident," "inhabitant," or "person."

Said the court: "It is used in connection with the rights and privileges pertaining to a man as a citizen, and not as a person or inhabitant" (pp. 691-692).

In this case, too, the court held § 5519 unconstitutional as a provision for the punishment of a conspiracy, within a state, to deprive an alien of rights guaranteed to him therein by a treaty of the United States. (**United States v. Harris**, 106 U. S. 629, supra, followed.)

1892 (April 4) **Logan v. United States**, 144 U. S. 263.

This decision (by six Justices) holds that a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States, has the right to be protected by the United States against lawless violence; this right is a right secured to him by the Constitution and laws of the United States; and a conspiracy to injure or oppress him in its free exercise or enjoyment is punishable under section 5508 of the Revised Statutes.

This case was argued in January, 1892. Logan was represented by Mr. A. H. Garland, who in President Cleveland's first administration (1885) had been Attorney General of the United States.*

In the course of the opinion the court alluded to the cases theretofore decided by the court, so strongly relied upon by "learned counsel," discussed them in detail, and distinguished them from the case at bar. The cases so discussed were **Reese, Cruikshank, Strauder, Ex parte Virginia, United States v. Harris, Civil Rights** cases, **Ex parte Yarbrough, Waddell, Baldwin v. Franks**, supra.

The court specifically distinguished **Harris** by saying: "The case is clearly distinguished from the case at bar by the facts that those prisoners were in the custody of

* And, see *Ex parte Garland*, 71 U. S. 333.

officers, not of the United States, but of the State, and that the laws, of the equal protection of which they were alleged to have been deprived, were the laws of the State only" (p. 290).

Of this whole series of decisions the court said:

> "The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgement by the United States, or by the States, as the case may be, and **cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals**; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress, by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object" (op. cit. p. 293).

These cogent words which furnish the yardstick for measuring the rights of this appellee were written by Mr. Justice Gray of Massachusetts. Among those who concurred were Chief Justice Fuller and Associate Justice Harlan.

Justice Gray proceeded:

> "Among the particular rights which this court . . . has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes . . . are the political right of a voter to be protected from violence while exercising his right of

suffrage under the laws of the United States; and the private right of a citizen, having made a homestead entry (under the laws of the United States), to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent." (293-4).

"In the case at bar," said the court, "the right in question does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them" (p. 294).

The principle of **In re Neagle**, 135 U. S. 1, was applied.

(The Chief Justice concurred though he had dissented in **In re Neagle.**)

The gist of both Neagle and Logan was thus stated: "The United States are (sic) bound to protect against lawless violence all persons in their (sic) service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply with equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense" (p. 295).

Mr. Justice Lamar (L. Q. C.) did not concur in the opinion of the court on the construction of section 5508 of the Revised Statutes.

As Circuit Justice, Justice Lamar had (in October, 1891) the year before presided (with Judge Newman) in the case of **United States v. Sanges et al.**, 48 Fed. 78.

Citing many of the cases which have been herein cited, and also **Slaughter House cases**, 16 Wall. 36, he held:

> "The amendments to the Constitution of the United States, including especially section 1 of the Fourteenth Amendment, so far as they relate to the rights of individuals, are intended to prevent the States and the United States, or any persons acting under their authority, from interfering with existing rights, and do not confer any new rights; and hence one cannot claim that his right to testify before a federal grand jury without interference from private individuals is one conferred by the Constitution of the United States, within the meaning of R. S., U. S., §§ 5508, 5509, which prescribe a punishment for any persons 'who conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution of the United States, or because of his having so exercised the same.' Ex parte Yarbrough . . .; U. S. v. Waddell, . . .; State v. Lancaster, 44 Fed. Rep. 896, distinguished" (p. 78).

The United States filed a writ of error. It was dismissed because such writ did not lie in behalf of the United States in a criminal case.

United States v. Sanges, 144 U. S. 310.

1895—In re Quarles, 158 U. S. 532.

Following In re Neagle, supra, and United States v. Logan, supra, the Court, speaking through Justice Gray, held that it is the right of every United States citizen to inform a marshal of a violation of federal laws; this right

is secured to the citizen by the Constitution of the United States; and a conspiracy to injure such citizen in the free exercise of enjoyment of such right is punishable under § 5508.

The Chief Justice (Fuller) dissented.

1900—Motes v. United States, 178 U. S. 458.

Yarbrough, Waddell and **Logan** cases applied in upholding indictment for conspiracy to oppress one Thompson because of his having informed Federal authorities of violations by conspirators of Federal laws.

1906—Hodges v. United States, 203 U. S. 1.

". . . whether a conspiracy or combination to forcibly prevent citizens of African descent, **solely because of their race or color,** from disposing of their labor by contract upon such terms as they deem proper and from carrying out such contract, infringes or violates a right or privilege created by, derived from or dependent upon the Constitution of the United States" was the question involved. It was answered negatively, two Justices dissenting.

This case is particularly important because it was the authority for the decision in:

1909—United States v. Powell, 212 U. S. 564, which has been previously discussed, and which affirmed **United States v. Powell,** 151 Fed. 648.

1915—Guinn et al. v. United States, 238 U. S. 347.

This case declared the so-called Grandfather Clause of the amendment to the constitution of Oklahoma of 1910 to be void as violative of the Fifteenth Amendment.* It

* Note: This case also categorically holds: "The establishment of a literacy test for exercising the suffrage is an exercise by the State of a lawful power vested in it not subject to the supervision of the Federal courts."

involved the responsibility of election officers under § 5508 and § 19 for preventing people from voting in mistaken reliance upon the protection of the Oklahoma provision. This question was also before the Court in the **Mosley** case decided the same day.

1915—United States v. Mosley, 238 U. S. 383.

This case, which had been submitted October 17, 1913, held that § 19 and § 5508 apply to the acts of two or more election officers who conspire to injure and oppress qualified voters in the exercise of their right to vote for member of Congress by omitting the votes cast from the count and the return to the state election board.

The crux of this case is succinctly stated at page 386 by Justice Holmes: "It is not open to question that this statute is constitutional,* and constitutionally extends some protection at least to the right to vote for members of Congress. Ex parte Yarbrough, 110 U. S. 651. Logan v. United States, 144 U. S. 263, 293. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put the ballot in a box."

Justice Joseph Rucker Lamar of Georgia dissented.

This case was relied upon by the government in the group of cases originating in the State of Ohio, and reported

1918—United States v. Bathgate et al. (and companion cases), 246 U. S. 220.

There the Court, which included Justice Holmes, who had written the opinion in **Mosley,** supra, and Justice Brandeis, would not extend the ruling in **Mosley** or **Yar-**

* The "void for vagueness" attack was not made.

brough or **Waddell** or **Logan** to a "conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and representative in Congress were chosen.

"The real point involved is whether § 19 denounces as criminal a conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and a representative in Congress are to be chosen. **Our concern is not with the power of Congress but with the proper interpretation of action taken by it.** This must be ascertained in view of the settled rule that **'there can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute'** (United States v. Lasher, 134 U. S. 624, 628) . . ." (Emphasis is added.)

1920—United States v. Wheeler, 254 U. S. 281.

I think that of all the cases construing the statute involved this is the most pertinent and applicable.

The "right" there involved was the right "to move at will from place to place, . . . to have free ingress thereto and egress therefrom."

The District Court in 254 Fed. 611 (1918), had held that § 19 had the same meaning when it was enacted as § 6 of the Act of May 31, 1870. "As there enacted it was intended to protect the political rights of citizens of the United States in the several states and not their civil rights as mere persons, residents or inhabitants. Baldwin v. Franks, 120 U. S. 678 . . ." (h. n. 5).

At page 616 (of 254 Fed.) the Assistant Attorney General was quoted as saying in his brief:

> "We admit that the fundamental rights of a person as such, or of a citizen as such are not secured to him by the Constitution of the United States . . ."

"For example, ordinarily the right to remain in any one place, or to move freely from place to place is not secured by the Constitution . . ."

But, he contended that "if state boundaries are brought into the question, if the right claimed be to remain in one of the several states of the federal union, as distinguished from another, or to move freely from one of the several states into another state of the federal union, it then becomes a right secured by the Constitution of the United States." Citing **Crandall v. Nevada**, 6 Wall. 35.

His contention was rejected by Circuit Judge Morrow who after summarizing Crandall said: "We do not see how the decision of the Supreme Court in Crandall . . . can be held decisive of this case."

On appeal, the Supreme Court affirmed, Chief Justice White writing, Justices Brandeis and Holmes among those concurring, and only Justice Clark dissenting.

The government had continued its reliance upon **Crandall**. As to it, the Court said:

"This leads us furthermore to point out that the case of Crandall v. Nevada, 6 Wall. 35, so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions . . ."

(p. 299).

The District Judge below apparently relied heavily on Wheeler as is shown by his frequent citations of it in his opinion (Tr. 28, 33).

1940—**United States v. Powe**, 309 U. S. 679.

Here, the Court composed of Chief Justice Hughes, and Associate Justices McReynolds, Stone, Roberts, Black, Reed, Frankfurter, Douglas and Murphy, denied the government's petition for writ of certiorari in the case reported, 109 F. 2d 147.

This case is alluded to by Justice Douglas in his dissent in **Williams** (341 U. S. at page 93) in such manner as to indicate his belief in the correctness of it as decided by Circuit Judges Sibley, Hutcheson and McCord.

Their opinion is worthy of consideration, too, because they, too (p. 150) relied on Wheeler.

Despite the Court's refusal to grant the application for certiorari in **Powe**, it on October 16, 1950, granted the application of the government in the Williams case (340 U. S. 849) because "important questions in the administration of civil rights legislation are raised" (341 U. S. 72).

1951—**United States v. Williams et al.**, 341 U. S. 70, was the result.

Wheeler was cited and relied upon by Justices Frankfurter and those concurring with him (op. cit. 77-8; 80).

It is cited in footnote 4, page 92, by Justice Douglas in connection with his statement that "The Cruikshank case, like others (including Wheeler) involved wrongful action by **individuals** who did not act for a state nor under color of state authority" (Emphasis his).

That quotation and his language at page 93 heretofore quoted leads to the inescapable conclusion that the dissenters in **Williams** had no quarrel with Wheeler, and other cases like it. Their dissent was based on the premise that Williams' action was not mere individual action.

Therefore, even in the light of the dissent in **Williams**, the truism stated by Judge Hughes in his argument in **Wheeler** remains the undisputed law of the land:

> "The provisions of the Fourteenth Amendment are also concerned with action by the States and do not confer a federal right to protection as against the action of individuals, in the absence of action by a State."

This thesis, established in the Wheeler case, is also supported almost uniformly by decisions of the Federal Courts, other than the Supreme Court.

1871—United States v. Hall, 26 Fed. Cases, p. 79 (Has been previously discussed).

1871—United States v. Crosby, Fed Case # 14,893, Circuit Court—D. S. C.

"The right to be secure in one's house is not a right derived from the constitution. It existed long before the adoption of the constitution, at common law, and cannot be said to come within the meaning of the words of the act, 'right, privilege, or immunity granted or secured by the constitution of the United States.' "

"Congress has power to interfere for the protection of voters at federal elections, and that power existed before the adoption of the fourteenth or fifteenth amendments to the constitution."

1874—United States v. Blackburn, Fed. Case # 14,603.

District Judge Krekel (W. D. Mo.) charged the jury:

> "The offenses charged consist in the conspiring together for the purpose of depriving colored citizens as a class of equal protection of the laws and of equal privileges and immunities to which they are entitled. At the present stage of the case, the

indictment must be treated, not only as charging an offense against the laws of the United States but as doing so in due form of law. No inquiry or suggestion as to the constitutionality of the law will therefore be proper, or indulged in."

1882—LeGrand v. United States, 12 Fed. 577 (Heretofore discussed).

1890—United States v. Lancaster, 44 Fed. 885.

A citizen of another state who had obtained a decree in a federal court in Georgia settling title to land has the right to proceed by contempt in such court against people violating the injunction which right was secured to him under the Judicial power (Art. 3, § 2, par. 1).

(This case was tried before Judge Emory Speer who had been United States Attorney in the prosecution which gave rise to the Yarbrough decision, supra.)

1891—United States v. Sanges, 48 Fed. 78 (Heretofore discussed).

1893—United States v. Patrick, 54 Fed. 338 (U. S. D. C. Tenn.).

Revenue officers engaged in a search for distilled spirits illegally concealed are exercising a right secured to them by the laws of the United States, and an indictment charging the killing by defendants of such officers while exercising such rights, and while defendants were engaged in a conspiracy to injure or oppress such officers is sufficient under § 5508.

The opinion was written by Circuit Judge Howell E. Jackson, February 1, 1893. He was commissioned Associate Justice of the Supreme Court, February 18, 1893.

He at page 351 quoted from U. S. v. Cruikshank, supra, 92 U. S. 553, 554, and wrote:

"Upon this distinction between rights and privileges existing independent of the constitution or laws of the United States, and those rights and privileges which are created or secured by said constitution depends the authority of Congress to legislate for the protection of citizens. Sections 5508 and 5509 are confined to rights or privileges of the latter class, **and can never be allowed to extend to offenses affecting rights or privileges of citizens which exist by state authority, independent of the constitution or laws of the United States.**" (Emphasis added.)

This case was one of those relied upon by the government in the Wheeler case, supra, and was distinguished by the court (254 Fed. at pp. 617-8).

1903 (February 24)—**Karem v. United States,** 121 Fed. 250.

Decided by Judges Lurton, Day and Severens, comprising the Circuit Court of Appeals, Sixth Circuit. Judge Lurton (of Tennessee) afterwards (1910) became an Associate Justice of the Supreme Court of the United States. Judge Day (of Ohio) was appointed Associate Justice of the Supreme Court February 25, 1903, the very day after this decision.

". . . § 5508 . . . is not appropriate legislation for the enforcement of the fifteenth constitutional amendment, both because it relates to the acts of individuals, and not of a state, and because it is broader in its terms than the legislation authorized by the amendment; and it will not sustain an indictment for conspiracy to prevent a citizen from voting at a purely state or municipal election on account of his race or color, whether the defendants are charged as individuals, or as officers of the state" (h. n. 3). At page 261, the Court said:

"Assuming that exemption from discrimination at a state election is a 'right or privilege secured by the Constitution or laws of the United States,' it is a right which originates only in the fifteenth amendment, and **can only be enforced by legislation directed to state action in some form**, by which otherwise qualified voters are denied the elective franchise on account of race or color. This is the limit of the power of Congress under the article. Section 5508 is not so limited, and is not, therefore, appropriate legislation for the enforcement of the fifteenth amendment" (p. 261, Emphasis added).

There was no appeal from this decision (304 F. 2d 603).

1898—United States v. Eberhardt, 127 Fed. 254 (N. D. Ga.).

The object of the conspiracy charged under § 5508:

(1) Deprivation of the "right and privilege of contracting and being contracted with"; (2) right and privilege of personal security, that is . . . and the right and privilege of personal liberty, that is moving and going wherever he, the said Thomas Bush, desired, without restraint or control."

Demurrer to the indictment sustained on authority of **In re Quarles**, 158 U. S. 532, **Cruikshank v. U. S.**, 92 U. S. 542. The court said that it was no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state than it would be to punish for false imprisonment.

1903—United States v. Morris, 125 Fed. 322 (D. C. Ark.).

"A conspiracy to prevent negro citizens from exercising the right to lease and cultivate land because they are negroes, is a conspiracy to deprive them of a right secured to them by the Constitution and laws

of the United States within the meaning of . . . § 5508."

(This case was not appealed.) The last paragraph of the opinion shows how mistaken the District Judge was.

1900—United States v. Lackey, 99 Fed. 952 (D. C. Ky.).

§ 5508 not limited to elections for representatives in Congress when allegation made that oppression was on account of their race or color.

Reversed, 1901, Circuit Court of Appeals, Sixth Circuit, Judges Lurton, Day and Severens, 107 Fed. 114.

1904—United States v. Moore, et al., 129 Fed. 630.

"The right of a citizen to organize . . . laborers . . . as well as the right of individuals . . . to unite for their own improvement or advancement . . . is a fundamental right of a citizen in all free governments, but it is not a right, privilege or immunity granted or secured to citizens of the United States, by its constitution or laws, and is left solely to the protection of the States."

"The fourteenth amendment of the Federal Constitution adds nothing to the rights of any citizen against another, but merely furnishes additional guaranties against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

"Federal courts have no jurisdiction to punish a conspiracy to oppress and intimidate a citizen . . . to prevent him from exercising the right to establish a miner's union in a state . . ."

1904—Riggins, Ex Parte, 134 Fed. 404.
(heretofore discussed)

1907—Smith v. United States, 157 Fed. 721.

A conspiracy to deprive any citizen of the right to freedom from slavery or involuntary servitude, one secured to every person within the jurisdiction of the United States by the thirteenth amendment, is indictable under § 5508.

1915—United States v. Aczel, et al., 219 Fed. 917 (D. C. Ind.).

Right to vote for Representatives and Senators are rights secured by Constitution and laws of the United States within § 19.

Affirmed **Aczel et al. v. United States**, 232 Fed. 652 (C. C. A. 7).

1916—Buchanan v. United States, 233 Fed. 257 (C. C. A. 8).

Intent is an essential of an offense under § 19, and where defendants believed that one of their number was entitled to improvements upon an unperfected homestead belonging to another, and in good faith went upon land and removed the improvements, they are not guilty.

1919—Chavez v. United States, 261 Fed. 174 (C. C. A. 8).

Follows United States v. Bathgate, supra, and distinguishes **United States v. Mosley**, 238 U. S. 383.

1920—Foss v. United States, 266 Fed. 881 (9th Cir.).

Indictment for conspiracy to intimidate citizens in the exercise of their right to appear and testify on behalf of contendants in cases involving lands entered upon under the laws of the United States. Indictment held good. Reference made to **Logan v. United States**, supra.

1921—Anderson v. United States, 269 Fed. 65 (C. C. A. 9).

Conspiracy to intimidate citizens by seeking to prevent them from furnishing supplies to the government for war purposes indictable under § 19.

1922—Roberts v. United States, 283 Fed. 960 (C. C. A. 8).

Conspiracy to prevent persons from acquiring title under the Homestead Act indictable under § 19.

1923—Nixon v. United States, 289 Fed. 177 (9th Cir.).

Indictment under § 19 for interference with right to hold, use and enjoy a homestead claim. Affirmed on authority of **United States v. Waddell,** supra.

1935—United States v. Kantor, et al., 78 F. 2d 710 (C. C. A. 2).

§ 19 protects only individual voter and does not include all wrongful acts altering results of election, but only act intended to prevent citizen from exercising his constitutional rights.

1935—Nicholson v. United States, 79 F. 2d 387 (C. C. A. 8).

Right of citizen to inform federal officers of unlawful movement of alcohol is one secured to him by laws and Federal Constitution and person interfering with right could be prosecuted under § 19 (18 U. S. C., § 51).

Follows **Motes,** supra.

1937—Walker v. United States, 93 F. 2d 383 (C. C. A. 8).

Indictment under § 19 (18 U. S. C., § 51) charging conspiracy to injure citizens in their right to vote for presidential electors and to have their votes counted as cast charged no federal offense, since presidential electors are "state officers," and not "federal officers."

Ex parte **Yarbrough,** supra, was distinguished (p. 388). The court said: "Manifestly, the right to vote for presidential electors depends directly and exclusively on state legislation" (Ibid.).

1942—United States v. Ellis, 43 Fed. Supp. 321.

Right to vote in a Federal election comprehends and includes the right to register for a general election in which members of Congress are to be elected.

I have rather laboriously read, digested and presented the cases involving what is now Section 18-241 U. S. C. My main purpose is so doing was to ascertain whether I could conscientiously state to the Court that as to this phase of the case, there is no novel question involved. I can so state. The only question is whether the Court will now adhere to the principle which has been gleaned from the decisions over a period of almost a century.

> "To know what the law is and to litigate anyway, using some technicality as an excuse, is more than an impropriety; it is an attack on the working of the law itself."*

If my view of the case is correct, the Court will have no reason to be concerned with questions 2 and 3 as stated in the Jurisdictional Statement (p. 3).

Nevertheless, I discuss them.

II.

"Does Section 241 reach unofficial conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964, relating to places of public accommodation?"

(Jurisdictional Statement, p. 3).

It is perfectly plain that if it does, it strengthens tremendously the void for vagueness argument hereinbefore made.

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* Attorney General Katzenbach at Emory University, on or about April 23, 1965. *The Macon News*, Apr. 24, 1965.

For, if it so reaches, it must be considered as if it read:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States including the right to the full enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in Section 301 (a) of the Civil Rights Act of 1964, without discrimination or segregation on the ground of race, color, religion, or national origin, and the right to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, rule, or order of a State or any agency or politicial subdivision thereof. . . ."

A statute more vague or indefinite than that could hardly be imagined.

Additionally, if 18 U. S. C. 241 were so construed it would cause a conspiracy to commit certain acts to become a Federal crime, and, at the same time, the actual commission of the very same acts would not be a Federal crime.

> "The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offenses are designated. A conspiracy is sufficiently described as a combination of two or more persons, by concerted action to accomplish a criminal or unlawful purpose, or some purpose

not in itself criminal or unlawful, by criminal or unlawful means, . . ."

Pettibone v. United States, 148 U. S. 197, 203.

I suggest that if the statute were so construed it would be void for vagueness because wilfulness or knowledge on the part of the conspirators would not be included in the statute as an ingredient of the crime, and such inclusion would be necessary, as it was in the **Screws** case, to save the statute.

"It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty must charge knowledge or notice, on the part of the accused, that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."

Pettibone v. United States, 148 U. S. 197, 206.

"Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide sweeping nets of conspiracy prosecutions."

Grunewald v. United States, 353 U. S. 391, 404;
Citing:
Delli Paoli v. United States, 352 U. S. 232;
Lutwak v. United States, 344 U. S. 604;
Krulewitch v. United States, 336 U. S. 440;
Bollenbach v. United States, 326 U. S. 607.

In his concurring opinion in the Krulewitch case, supra, Mr. Justice Jackson wrote:

"This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

336 U. S. at pp.446-7.

How much the more serious is the threat when the government seeks to indict for conspiracy, and to have the conspiracy statute broadened, when there is no substantive Federal offense for which this appellee could be prosecuted in a Federal Court.

For convenience, I quote what the District Judge said with respect to the applicability here of the Civil Rights Act of 1964:

"Having decided that none of these rights and privileges are federal citizenship rights and privileges, and that none of them appertain to federal citizenship as such, we need go no further. We are convinced, however, that the Civil Rights Act of 1964 in no way aids the prosecution. It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself. Throughout the Act are provisions for injunctive relief, including restraining orders and temporary and permanent injunctions. Section 1101, in part, reads:

" 'In any proceeding for criminal contempt arising under Title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. Upon conviction, the accused shall not be fined more than $1,000 or imprisoned for more than six months,' and § 207 (b) says:

" 'The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring non-discrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.'

"The Congress could hardly have made plainer its intention not to bring into play the ninety-four year old ten year felony statute."

(Transcript, pp. 34-35.)

At that point, the District Judge inserted the following as a footnote:

"Senator Humphrey,* the leading spokesman for the Civil Rights Act, explained subsection 207 (b) in a speech delivered on the floor of the Senate on May 1, 1964, as follows:

" 'The clause which reads that "the remedies provided in this Title shall be the exclusive means of enforcing the rights thereby created" is designed to make clear that a violation of sections 201 and 202 cannot result in criminal prosecution of the violator

* Now, of course, Vice President of the United States.

or in a judgment of money damages against him. **This language is necessary because otherwise it could be contended that a violation of these provisions would result in criminal liability under 18 U. S. C. 241 or 242** . . . Thus, the first clause in section (207 (b)) simply expresses the intention of Congress that the rights created by Title II may be enforced only as provided in Title II. This would mean, for example, that a proprietor in the first instance, legitimately but erroneously believes his establishment is not covered by section 201 or section 202 need not fear a jail sentence or a damage action if his judgment as to the coverage of Title II is wrong.' "

To paraphrase what the government argues at page 33 of its brief herein: The most compelling evidence of the intent of the framers of the Civil Rights Act of 1964 is, of course, to be found in the statements made in debates by the leading spokesman for the Act, who now happens to be Vice President of the United States.

After quoting Senator Humphrey, Judge Bootle observed:

"Indeed in the recent case of Atlanta Motel v. United States, ... U. S. ... (Dec. 14, 1964), the Supreme Court, after an analysis of Title II of the Act, concludes that under it 'remedies are limited to civil actions for preventive relief.' "

III.

What has been said in the preceding sections of this brief answers *a fortiori* the third question stated by the government at page 3 of its Jurisdictional Statement:

"Whether Section 241 reaches unofficial conspiracies against the right to freely enter and leave the

State and the right to freely use the instrumentalities of interstate commerce."

IV.

At page 33 of its brief the government states:

> "The contemporary history of the Equal Protection Clause and the Fifth Section of the Fourteenth Amendment indicates a purpose to authorize congressional legislation reaching private conspiracies."

Its first argument in support of that thesis is: "The most compelling evidence of the intent of the framers of the Fourteenth Amendment is, of course, to be found in the reports and debates of the Thirty-Ninth Congress which drafted the Amendment and proposed it to the States. But, unfortunately, those materials contain nothing really conclusive on the point at issue here."

After several pages of discussion, which serves only to confirm the original statement that the reports and debates contain nothing really conclusive on the point at issue here, the brief states (p. 40):

> "The earliest judicial decisions sustained congressional power to protect the rights which the Fourteenth and Fifteenth Amendments secure against private encroachment. Their proximity to the Amendment suggests that they accurately translate the original understanding."

At pages 41 and 42, then the government cites as supporting that argument, **United States v. Hall**, 26 Fed. Cas. 79, decided by Judge Woods, and **United States v. Mall**, 26 Fed. Cas. 1147. Both of these cases were decided in 1871. **But**, the government overlooked pointing out, as I have heretofore in some detail, that in **LeGrand v. United States**, 12 Fed. 577, the same Judge Woods, then (1882)

Justice Woods, after the decisions of the Supreme Court in **U. S. v. Reese**, 92 U. S. 214; **U. S. v. Cruikshank**, 92 U. S. 542; **Virginia v. Rives**, 100 U. S. 313, wrote:

> "It is perfectly clear . . . that when a state has been guilty of no violation of its provisions the section does not confer on Congress the power to punish private individuals who, acting without any authority from the state, and it may be in defiance of its laws, invade those rights of the citizen which are protected by the amendment" (op. cit. p. 579).

At pages 42-43 of its brief, the government cites along with Hall and Mall, as supporting its argument, **United States v. Given**, 25 Fed. Cases, p. 1324. The government states that Given was a State official (p. 43). The rulings in the case make it clear that not merely "private encroachments" were involved. The second headnote is:

> "When state laws have imposed duties upon persons, whether officers or not, the performance or non-performance of which affects rights under the federal government, Congress may make the non-performance of those duties an offense against the United States, and may punish it accordingly."

The indictment there was under section two of the act of Congress of May 31, 1870, which enacts "that if by or under the authority of the constitution or laws of any state, . . . any act is or shall be required, etc."

Despite the fact that it concedes that Given was a "State official," the government labors to make use of this decision as a "contemporary construction" because, forsooth, Justice Strong, at page 1326, uses the phrase "from any quarter."

This decision was rendered in 1873. If there is the slightest doubt as to the views of Justice Strong on this

question, we need only read his opinion in **Virginia v. Rives,** 100 U. S. 313, October Term, 1879, and particularly that portion of it at page 318:

> "The provisions of the Fourteenth Amendment of the Constitution which we have quoted all have reference to State action exclusively, **and not to any action of private individuals.** It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment **are intended** for protection against State infringement of those rights. Section 641 (of the U. S. Revised Statutes) was also intended for their protection against State action, **and against that alone.**"

If there remains any doubt, read his opinion in **Ex Parte Virginia,** decided contemporaneously with **Virginia v. Rives,** supra. In **Ex parte Virginia,** 100 U. S. 339, at pages 346-347, Justice Strong wrote:

> "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No **State** shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within

its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

"But the constitutonal amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to **enforce** its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured."

Previously, in the some opinion, Justice Strong had written:

"They (the 13th, 14th and 15th Amendments) were intended to take away all possibility of oppression **by law** because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." (Emphasis added.)

Justice Strong (of Pennsylvania) had been appointed by President Grant as an Associate Justice February 18, 1870. From 1857 to 1868 he had been an Associate Justice of the Supreme Court of Pennsylvania. From 1868 to the time of his appointment to the court, he practiced law in Philadelphia.

Such was the Justice who wrote for the Court the sentence which for four score and five years has been an established principle of Constitutional Law:

> **"The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."**
>
> **Virginia v. Rives,** 100 U. S. 313, 318.

For four score and five years those words have comprised an established principle of Constitutional Law by which the States and their people might regulate their affairs.

Times innumerable this case has been cited by the courts. Even in such cases as **Cooper v. Aaron,** 358 U. S. 1, 16-17; **Shelley v. Kraemer,** 334 U. S. 1; **Pennsylvania v. Board of Directors of City Trusts of Philadelphia,** 353 U. S. 230, 231, the principle it, and its companion case, and prior cases established has been recognized as controlling.

Justice Brandeis, following it, succinctly expressed its principle: "The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the state, as distinguished from action by private individuals."

> **Iowa-Des Moines National Bank v. Bennett,** 284 U. S. 239, 245.

"Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked."

> **Rice v. Sioux City Memorial Park Cemetery, Inc.,** 349 U. S. 70, 72.

In **Griffin v. Maryland,** 378 U. S. 133, 135, the Chief Justice recognizes the need for state action in order for the Fourteenth amendment to be applicable.

I cite these few cases from the many available to show how unbrokenly and recently the established principle has been applied.

Since the principle was first established and applied, the Congress has proposed to the States eleven amendments.* Never in these eighty years or more, has the Congress sought to amend the Constitution so as to give the Fourteenth Amendment the meaning the Justice Department seeks to have the Court ascribe to it.

In so seeking, its brief says of **Virginia v. Rives,** 100 U. S. 313, and **Ex parte Virginia,** 100 U. S. 339:

> "The ruling of the court was not a restrictive one; it found State officers of every category amendable (sic) to the Fourteenth Amendment, without purporting to decide whether Congress might also reach private persons in certain circumstances" (Its brief, page 49).

I find it difficult to reconcile that statement with the succinct statement in **Virginia v. Rives,** supra: "The prohibitions of the Fourteenth Amendment have exclusive reference to State action" (100 U. S. 313, first sentence of headnote two; see also p. 318).

At pages 50-51 of that brief it is stated: "To be sure, it has been reiterated that 'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.' E. g. Shelley v. Kraemer, 334 U. S. 1, 13. But such statements

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* The sixteenth through the twenty-fourth, inclusive; the Child Labor Amendment which was proposed but not ratified; the proposed Presidential disability amendment, now pending for ratification.

may fairly be read as defining only the self-executing force of the Amendment, unaided by implementing legislation."

This argument seems to be that "implementing legislation" may go beyond the authorization of the Constitutional amendment. Such an argument overlooks the fundamental principle that to be appropriate legislation under § 5 of the Amendment it must not exceed the limitation of § 1.

The complete answer to it is found in **Virginia v. Rives**, supra, 100 U. S. 313, wherein there was being considered Section 641 of the United States Revised Statutes which was legislation implementing the Fourteenth Amendment.

> "The prohibitions of the Fourteenth Amendment have exclusive reference to State action. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and, consequently, **the statutes founded upon the amendment**, and partially enumerating what civil rights the colored man shall enjoy equally with the white are intended for protection against State infringement of those rights. Sect. 641 was also intended to protect them against State action, and against that alone.
>
> "A State may exert her authority through different agencies, and those prohibitions extend to her action denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion . . ." (headnotes 2 and 3).

And see the discussion at pages 318-319 of the opinion.

CONCLUSION.

I submit this brief to the Court on behalf of the Appellee, Lackey, because I had the honor of being appointed by the Court to represent his interests. I have attempted to perform that duty by somewhat laboriously presenting to the Court what I deem to be established and controlling principles of American Constitutional Law.

I have attempted to approach the questions involved bearing in mind the views expressed by the late Justice Frankfurter in **West Virginia State Board of Education v. Barnette**, 319 U. S. 646-647:

> "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a life time. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."

As a member of the Bar, I am bound, if I weren't otherwise, to "support and defend the Constitution of the United States."

As a member of the same faith as the late Justice Frankfurter, I have a personal interest, too. Over the years, I have struggled against stretching and distortions

of our Constitution. Principally I have so struggled because I conceive it to be my duty as a citizen and lawyer to defend the Constitution against assaults from whatever source. I have so struggled because it is my firm belief that if our Constitution is to be amended that process should be in accordance with Article V thereof.

I have so struggled because I sincerely believe that the only hope any American, certainly any minority, has for survival is in strict construction of and obedience to our written Constitution as construed unbrokenly over the years. If, today, those in power can stretch and distort the Constitution favorably to a minority, tomorrow, another and adverse group, risen to power, can stretch and distort it to destroy that minority.

From every standpoint, I can sincerely and respectfully submit to the Court that Judge Bootle's judgment was correct, fully supported by controlling precedents, and should be affirmed.

.....

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Spergeon Lackey
(By Appointment of the Court).